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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, Formerly Kathrine
Smith, Appellant,

vs.

HARRY B. HILL, Appellee.

Upon Appeal from the District Court of the United
States for the District of Washington, Southern
Division.

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STATEMENT.

This suit was instituted to set aside a conveyance of certain real property in Clarke County, Washington, on the grounds that the conveyance was secured by the grantee by the abuse of a confidential relationship with the grantor, who was without independent advice, and upon representations constructively fraudulent. It is set out in the bill of complaint that on the 16th day of June, 1912, the complainant became possessed of certain real property, and on the 21st day of September, 1912, the plaintiff mortgaged the premises to one Kramer for a loan of \$500, and on the 19th day of October, 1915, the mortgage was past due and the principal and in-

terest had not been paid and that proceedings had been instituted to foreclose the mortgage. On the 20th day of October, 1915, the respondent gave the complainant in Portland, Oregon, a sum of money to pay this mortgage, with which she paid this mortgage, and it was satisfied of record. The bill charged that for some years prior to the time of the satisfaction of the mortgage the parties were close and intimate friends; that Mrs. Smith was a widow and without means and was beset with financial difficulties and Mr. Hill, who represented himself as a married man, but separated from his wife, was an intimate friend of Mrs. Smith's sister and brother-in-law; that during these times the parties to this suit were engaging in all sorts of intimate relationships, and the respondent represented to Mrs. Smith and caused her to believe that he possessed an overpowering affection for her and had her interest at heart and his intentions towards her were honorable, and by reason thereof, she reposed unbounded confidence in his advice and opinions to such an extent that in her social and business affairs she acted in accordance with his advice and counsel.

That during the years 1915 and 1916 Mr. Hill's relations with Mrs. Smith were still more intimate and she was perturbed about her financial affairs and her relations with Mr. Hill, who represented that he would secure a divorce from his wife at a proper time; that he ingratiated himself with Mrs. Smith's relatives, who

importuned her to act in accordance with the counsel of Hill; that he was visiting with her at her home in Portland several days each month and during his absence was writing her affectionate letters; that she need not worry about her lack of success in business, as he would provide for her, and he was giving her small presents of money; that he was intrusting her with money to invest in some device which he was purchasing and was giving her some interest in it; that he had applied for an endowment insurance policy in the sum of \$5,000 in which she was the beneficiary, and made her his heir in his will; that the mortgage was paid by money furnished by him and he informed Mrs. Smith that it was a present to her; that on October 20, 1915, he gave her the money to pay the Kramer mortgage and informed her that this was a present to her.

In Paragraph XII it is charged that between October 20, 1915, and August 10, 1916, in order that he might keep her under his control he represented to her that the property would be wholly lost to her by her improvidence unless she conveyed it to him, and, inciting her in her perplexity and distress and while under his influence and while she did not have independence of mind or resort to independent advice, in breach of the confidential relationship as confidential friend and apparent advisor, when really designing to act for his own interest and personal benefit, did induce and prevail upon her to make a deed to the premises without any consideration, pursuant to a secret intention to secure

the lands for himself, all of which was done in breach of the confidential relation between friend and friend when in relation of advisor, one to the other.

The respondent admitted in his answer the outstanding mortgage and the payment thereof and the conveyance of the property to him, but alleged that between January 1, 1914, and August, 1916, he loaned to complainant for her accommodation and at her request, without any time being agreed upon for repayment, sundry and divers sums of money aggregating \$1,000. That the conveyance was given to him as security for the debt, and was intended to operate as a mortgage as security for the aggregate debt, and that he demanded payment of the money, and that refusal to pay was made, and judgment is prayed for \$1,000 with interest and costs and that the deed be declared a mortgage and that the premises be sold on foreclosure.

ASSIGNMENTS OF ERROR

I.

The District Court of the United States for the District of Washington, Southern Division, erred in sustaining the respondent's objection to the receiving and admitting in evidence of certain exhibits referred to in the transcript of testimony herein.

II.

The Court erred in making Findings of Fact in

favor of the respondent and not in favor of the complainant.

III.

The Court erred in finding that the complainant failed to establish the allegations of her complaint and was not entitled to recover in this action, and in dismissing the complainant's complaint.

IV.

The Court erred in finding and in entering judgment against complainant and in favor of respondent for the sum of One Thousand (\$1,000) Dollars and the further sum of twenty-nine and twenty-hundredths (\$29.20) dollars with interest thereon at the rate of six (6%) per cent per annum from the 29th day of October, 1919, and in entering judgment and decree therefor in favor of the respondent and against the complainant.

V

The Court erred in finding that the certain deed filed for record on the sixth day of June, 1917, in the Records of Clarke County, Washington, and recorded in Volume 120 of the Deed Records at page 587 thereof, wherein Kathrine Smith was grantor and Harry B. Hill was grantee, conveying the following described premises in Clarke County, Washington, to-wit:

(Description Omitted)

was given by the complainant to the respondent to secure him the repayment of moneys advanced, which the Court found to be in the sum of \$1,029.20 and was a mortgage to secure to respondent the payment of said sum with interest and costs of this suit, and in entering a decree declaring said mortgage to be a lien upon said described real premises, and directing that the same should be foreclosed and said property sold by the marshal in the manner provided by law, and in further ordering and adjudging that upon a confirmation of such sale a certificate of purchase issue to the purchaser, and that the complainant be forever barred and foreclosed of any and all right, title, interest or equity of redemption in or to said premises.

VI.

That the decree is against the manifest weight of evidence.

VII.

The Court erred in holding and deciding that the complainant was not entitled to the relief prayed for in her complaint herein.

POINTS AND AUTHORITIES

The burden of showing that a deed absolute on its face was really intended as a mortgage rests upon the

one who asserts that to be a fact, which must be shown by clear and satisfactory evidence.

27 Cyc. 1017, 1018;

Albany, Etc., Co. v. Crawford, 11 Or. 243.

The intention of the parties is the governing factor. It is this which must be sought, and where it can be ascertained, it must prevail, and it is essential that the understanding and intention of both parties, grantee and grantor, should concur, to convert a deed absolute in its terms, into a mortgage.

27 Cyc. 1007.

ARGUMENT

The Court found the conveyance of August 10, 1916, between the parties was given to secure a loan. We believe that there is not sufficient evidence that this conveyance was so intended. It is a rule without exception that the burden of showing that a deed absolute on its face was intended as a mortgage rests upon one who avers that fact, which must be shown by clear and satisfactory evidence; also upon the intention of the parties as determined from a consideration of the circumstances, pecuniary relations of the parties, their negotiations, their contemporaneous acts and declarations and subsequent acts and admissions.

With this preliminary statement of the law applic-

able to the case, let us turn to the facts and see whether the appellee has shown by clear and satisfactory evidence that this deed was intended as a mortgage, or did it not have a crafty purpose behind it. In reviewing the testimony we find intimate relations between the parties commencing back in 1912. In fact, Mr. Hill's attorney compelled her to admit that the relations between them were adulterous in their inception. Mr. Hill was an intimate friend of Mrs. Smith's sister and her husband, and according to his sworn testimony had been making his home at their house in Aberdeen, and had been loaning them large sums of money, and according to both Mrs. Smith's and Mr. Hill's testimony his relations at the home of Mrs. Smith's sister brought about the intimacy between them, and it was during his time that an adulterous intercourse commenced between them. Shortly afterwards Mrs. Smith's husband died. During these times Mr. Hill was holding himself out to Mrs. Smith as a married man and separated from his wife who was residing in the East and from whom he would secure a divorce at the proper time, although he swears on the stand that he was a single man when he first met Mrs. Smith.

Eventually Mrs. Smith moved to Portland and opened a small rooming house on money she borrowed from Hill. He made her home in Portland his home on his frequent trips to Portland, staying there nights and their relations during these times were not any more intimate than husband and wife, she explained.

The letters he wrote her show that he was making desperate love to her during his absence from her and were designed to retain her confidence and affection. These letters prove that he was purchasing a policy of insurance in which she was made the beneficiary, although he denied this on the stand; they also show that he was purchasing an interest in some device, promising her an interest in the profits derived from it and that he would take care of her financially in event it became necessary. She says that she never requested him to pay the Kramer mortgage in 1916, but he volunteered to pay it and she offered him a mortgage and he refused to take it and he told her that in paying it off he was making her a present.

During these times, she says that she felt toward him, "Just as I would my own husband, everything, everything in the world;" and he represented to her that he wanted to make a home on this particular property. He repeatedly told her not to worry about her pecuniary distress and was giving her small sums of money. These letters glow with the warmth of a youthful lover.

Mrs. Smith testified that the inducements made for the giving of the deed to Hill nine months after the payment of the Kramer mortgage were that: "He just says that I could have it for myself and that he would make a home of it, that there would not be a squabble over the property and we would have a home some day."

There is no creditable testimony to show that at the time the deed was made there was anything said about securing the money he had given her for the payment of the Kramer mortgage. It was her trust and confidence in him and his representations and professions that caused her to make the deed, and not because any security for advances was contemplated. No promissory note was taken, nor was the deed recorded until June, 1917.

If the deed was intended as security there certainly would have been some accounting and evidence of the indebtedness. Now, it is claimed that Defendant's Exhibit "A" is evidence of such understanding. But it bears date of December 22, 1916, over three months after the signing of the deed. Mrs. Smith says that it was sent to her through the mail along with some poetry on February 8, 1918 (Plaintiff's Exhibit No. 2), when their relations became estranged owing to attentions being paid her by her present husband, and that this paper was antedated. A man who had been guilty of playing fast and loose for years with this confiding woman was capable of attempting to perpetrate such a trick.

Now, the Kramer mortgage was paid on October 20, 1915, and on August 10, 1916, plaintiff made the deed in question to the appellee. It is to be noted that the letter of June 12, 1916, shows in what melancholy state of mind Mrs. Smith was at that time, and his reply contained such an assertion as "I have no desires to find

someone I could care more for. I only wish I was situated so we could be together, hope to be some of these days. I want to get a little money ahead so that we can go to some other part of the country."

I think the testimony shows that in August, 1915, Hill was desirous of continuing his relations with Mrs. Smith indefinitely and that he foresaw that unless he married Mrs. Smith these relations eventually would be interfered with or would become burdensome and that she would have occasion to sever them unless he had some hold on her and that the only way in which he could retain his influence over her was to cause her to believe that he had great regard and affection for her, and was unable to marry her, which was false, and to show his affection for her, he paid the Kramer mortgage, and caused her to believe this was a present to her, and had her believe that he had his life insured for her as a further evidence of his affection for her and at the same time he took advantage of her confidence in him growing out of these representations and his supposed generosity to secure a deed when he could accomplish it, without arousing her suspicions, to protect him in event these relations were broken off, for the money which he had given her. Mrs. Smith was an easy victim of his scheme and it never occurred to her that Hill was craftily attempting to protect himself for money given her, and at a future time he would demand a return of the money he caused her to believe he had given her. If these were his intentions, and they are abund-

antly established by the testimony in the record, there is nothing in the record to show that this deed was intended as a mortgage as contended for by him. On his part, the securing of the deed from her was deception based upon confidence, and false representations and promises as to his intention for the future, and not because they had agreed between themselves that the deed should operate as a mortgage. The courts should not be made an instrument to enforce the deception.

Respectfully submitted,

WM. P. LORD.

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